Supreme Court, U.S.
FILED

No.

941514 MAR 14 1995

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

GEORGE GILMORE MARTIN and
JULIA S. MARTIN

Petitioners,

vs.

BANK OF FLOYD; GENTRY, LOCKE, RAKES & MOORE, WILLIAM R. RAKES; G. HARRIS WARNER, JR.; WILLIAM J. CREECH, JR.; AND RONALD LEON MOORE

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

George Gilmore Martin and
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Pro Se

A. - The Questions Presented for Review:

(1) Is purposeful availment requirement for specific personal jurisdiction satisfied if defendants purposefully direct criminal activity into the forum and the plaintiffs' cause of action arises from that activity?

(2) Would the assertion of personal jurisdiction in this case comport with "fair play and substantial justice"?

B. - A List of All Parties:

George Gilmore Martin

Julia S. Martin

Bank of Floyd

Gentry, Locke, Rakes & Moore

William R. Rakes

William J. Creech, Jr.

G. Harris Warner, Jr.

Ronald Leon Moore

There are no parent or subsidiary companies to be listed.

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D. A reference to the official and unofficial reports of opinion delivered in this case by other courts:

None were published - See Appendix

E. Statement of the grounds on which the jurisdiction of the Supreme Court of the United States is invoked:

i Date of Entry of Judgement Sought to be Reviewed - January 11, 1995;

ii Date of Order Respecting a Rehearing - February 6, 1995; and

iii The statutory provision believed to confer on the Court Jurisdiction to review the Judgment in question by Writ of Certiorari - 28 U.S.C.A. §1254(1)

F. The Constitutional provision invoked in this case:

"... nor shall any State deprive any person of life, liberty, or property, without due process of Law. . ."

Fourteenth Amendment to the Constitution of the United States of America.

G. Statement of the case:

Under diversity of citizenship, on May 5, 1993, plaintiffs filed a Rico lawsuit against defendants in Federal District Court in Atlanta, Georgia. Plaintiffs have basically alleged that the defendants are joint participants in interstate schemes to cheat the plaintiffs out of approximately $401,650 in property value and $200,000 in cash. Plaintiffs alleged that defendants in furtherance of the schemes sent or caused to be sent into the forum 12 mailings to the Plaintiffs. These forum mailings are alleged to have violated §18 U.S.C.A. 1341 (Mail Fraud) and formed a large number of predicate acts

of racketeering activity in violation of 18 U.S.C.A. 1962 (Rico).

More specifically, in the Complaint, the Plaintiffs have basically alleged:

1. That the defendants specifically targeted the Plaintiffs; when residents of the forum, as victims in two fraudulent schemes and specifically directed actions against the Plaintiffs in the forum to further and effectuate their schemes.

2. Defendants personally sent six separate intrinsically deceptive letters into the forum intending for the Plaintiffs to rely thereon in the forum. The Plaintiffs read the deceptive letters in the forum, were deceived in the forum, relied on the deceptive letters in the forum, failed to take action in the forum because of the

letters and suffered injury in the forum as a consequence of the actions of the Defendants in effectuating their schemes. The Defendants all knew or reasonably should have anticipated that their action would result in injury to the Plaintiffs in the forum. In fact, one scheme had as its final objective the extraction of over $200,000 of Plaintiffs' money from the forum.

3. In the Complaint, the following was specifically alleged:

(a) "In order to forward the purpose of executing the schemes to defraud the [Plaintiffs], on or about August 21, 1991, [a Defendant] . . . willingly and knowingly mailed a letter . . . to [Plaintiffs in the forum]. . . . [T]he mailing of this letter . . . constituted a violation by [Defendants] personally of 18 U.S.C.A. §1341 (Mail Fraud). This was the first predicate act of racketeering activity in

Violation 18 U.S.C.A. (1962) (Rico)".

(b) "In order to forward the purpose of executing the schemes to defraud the [Plaintiffs], on or about October 10, 1991, a [Defendant] . . . willfully and knowingly mailed a letter . . . to [Plaintiffs in the forum] . . . [T]he mailing of this letter. . . to the [Forum] constituted a violation by [Defendants] of 18 U.S.C.A. §1341 (Mail Fraud) and was the third predicate act of racketeering activity in violation of 18 U.S.C.A. §1962 (Rico)".

(c) "In order to forward the purpose of executing the schemes to defraud the [Plaintiffs], on or about November 19, 1991, a [Defendant] willfully and knowingly mailed . . . [four separate and distinct letters to plaintiffs] . . . The mailing of [the] letter[s] constituted violation[s] of 18 U.S.C.A. §1341 (Mail Fraud) and [were separate] predicate act[s] of racketeering activity in violation of 18 U.S.C.A. §1962 (Rico)."

(d) "In order to forward the purpose of executing [the schemes, the Defendants caused four separate return

receipts to be signed in the forum by plaintiffs and mailed from the forum. These mailings were mail fraud violations and predicate acts of racketeering."]

(e) "In order to forward the purpose of executing the fraudulent schemes, [the Defendants knowingly caused the Secretary of the State of Virginia to mail two separate letters to the Plaintiffs in the forum. These mailings were separate] violations of 18 U.S.C.A. §1341 (Mail Fraud) and predicate acts of Racketeering activity in violation of 18 U.S.C.A. §1962 (Rico)."

(f) "[That the 12 separate mailings into and out of the forum on behalf of the separate defendants constituted a large number of criminal acts in the forum. Specifically, Defendents committed] forty-eight (48) predicate acts of Racketeering activity in [the forum which] are indictable and triable in [the forum]."

On May 27, 1993, Defendants, Bank of Floyd and Ronald Leon Moore, filed a Motion to Dismiss, in relevant part, for Lack of

Jurisdiction over the persons of the respective Defendants. Also filed therewith was an Affidavit by a Defendant. In the Affidavit, it was stated that the respective defendants are not residents of the forum, do not own property in the forum, and do not regularly engage in or solicit business in the forum.

On June 9, 1993, the remaining Defendants filed a Motion to Dismiss, in relevant part, for Lack of Jurisdiction. Also filed therewith was another Affidavit by another Defendant. In that Affidavit, it was stated that the remaining defendants were not residents of the forum, did not regularly engage in or solicit business in the forum, various actions of defendants (other than the 12 letters caused to be sent by Defendants into the forum) occurred outside the forum, and an admission that eight of the 12 letters sent into the forum were caused by the Affiant- Defendant himself.

On June 14, 1993, one of the Plaintiffs filed an Affidavit wherein it was stated that he was a resident of the forum, that during most of 1991, while a resident of the forum, the Bank of Floyd had carried on a banking business relationship with him in the forum (both loan and deposit), the Bank directed numerous correspondence and telephone calls to him in the forum concerning their business relationship, the Bank had sent to him in the forum numerous letters soliciting his business (present and future), and that the bank had, also, carried on banking business with at least one other resident of the forum in the forum itself (that person not being a party to the litigation).

On July 6, 1993, the same Plaintiff filed a second affidavit wherein it was stated that, while being a resident of the forum, he personally sustained damage in the forum from certain tortious acts of the Defendants in the forum, to have been injured as a

proximate result of the Defendants' commission of predicate acts of racketeering (over 75% of which occurred in the forum), that the injuries flowed directly from the commission of predicate acts occurring in the forum, that he was deceived in the forum by six letters sent to him in the forum by the Defendants, mislead into inaction in the forum, and personally damaged in the forum by losing the value of his property as a result of the misconduct of Defendants in the forum and by having to expend money from the forum because of the scheme to cheat him out of $200,000 in the forum.

On March 1, 1994, an order was signed by the U. S. District Court Judge concluding that the Defendants were not subject to the jurisdiction of the forum because;

> "the defendants did not purposefully do some act or consummate some transaction with or in [the forum] . . . Accordingly, the Court concludes that Defendants do not have minimum contacts with [the forum] that would make them amenable to service of process under the Georgia long-arm statute. Furthermore,

> no minimum contacts exist, which would establish a constitutionally sufficient relationship with Georgia that the exercise of jurisdiction by this court would be consistent with traditional notions of fair play and substantial justice."

On January 11, 1995, the 11th Circuit Court of Appeals affirmed the District Court's dismissal of Plaintiffs' action for the reason of lack of personal jurisdiction over any of the defendants.

On February 6, 1995, the 11th Circuit Court of Appeals denied a petition for rehearing by Plaintiffs.

J. Reasons Relied on for the Allowance of the Writ:

The 11th Circuit of the United States Court of Appeals has decided federal questions in a way that conflicts with applicable decisions of the Supreme Court of the United States.

(1) Is purposeful availment requirement for specific personal jurisdiction satisfied if

Defendants purposefully direct criminal activity into the forum and Plaintiffs' Cause of Action arises from that activity?

This question was basically answered by the United States Supreme Court in 1985 in the Case of Burger King v. Rudzewicz, 471 U.S. 462. Therein, the Court stated that "where a forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there, the 'fair warning' requirement is satisfied if the Defendant has purposefully directed his activities at residents of forum. . . and the litigation results from alleged injuries that arise out of or relate to those activities." Moreover, the Court stated "... the foreseeability

that is critical to due process analysis is that Defendant's conduct and connection with the forum State is such that he should reasonably anticipate being haled into court there."

In conclusion, if Defendants purposefully direct criminal activity into a forum, then the Defendants should reasonably anticipate being haled into Court in the forum to stand trial at least for the criminal charges they themselves created in the forum. In this case, the Defendants are alleged to have "willfully and knowingly" sent or caused to be sent 12 mailings into the forum in furtherance of their schemes to cheat the Plaintiffs. These mailings have been alleged to be violations of the Mail Fraud

laws. The Rico litigation arises from these alleged mail fraud violations. Given this, the exercise of jurisdiction under the Georgia Long-Arm Statute comports with due process concerning minimum contacts.

2. Would the assertion of personal jurisdiction in this case comport with fair play and substantial justice?

   a. The burden on the Defendants in defending this action in Georgia is light. Atlanta has a first class airport with many direct flights to and from Roanoke, making travel between the two points quick and convenient. The Defendants are ably represented by competent Georgia counsel. Most all of the documentary evidence is already in the possession of the plaintiffs in Atlanta.

Contemporary instantaneous communication by fax, E. mail, computer, and cellular telephone have effectively associated formerly distant persons, businesses, and other entities into new communities where physical distance is immaterial. Besides, any inconvenience caused to Defendants by subjecting them to the jurisdiction of the Northern District of Georgia is overridden by the greater inconvenience of requiring Georgia plaintiffs, who were injured in Georgia by the Defendants' purposeful activity in and directed at Georgia, to pursue their cause of action in a foreign forum.

b. Georgia's interest in adjudicating this dispute is manifest given

that it has a compelling interest in protecting its residents from fraudulent schemes, launched from other states, specifically directed at its residents which cause damage in Georgia to the extent of $400,000 or more. Schemes of this magnitude, repeated often enough, could financially wipe out large numbers of Georgia residents, reducing them to abject poverty and necessitating state aid.

c. The Martins' interest in having their case adjudicated in Atlanta is manifest. They are Georgia residents who seek relief for the crippling financial injuries they suffered in Georgia as a direct result of the Defendants personally targeting them for financial harm and specifically

and purposely directing action toward them in Georgia.

d. The interstate judicial system's interest in obtaining the most efficient resolution of this controversy is not offended by Georgia's exercise of personal jurisdiction herein. A considerable time and effort has already been put forward by the Defendants' Georgia attorneys and Georgia judges in understanding the facts and law herein. To start all over again in Virginia would be a waste of this effort and would be inefficient. Thus, efficient resolution of this case suggests that jurisdiction be asserted over the Defendants in Georgia. Furthermore, there is nothing to suggest it would be any more efficient in Virginia.

e. Finally, Georgia has a manifest interest in furthering its fundamental substantive social policy of protecting its residents from financial harm caused within its borders by persons who launch schemes from other states into Georgia intentionally to harm specific Georgia residents. Virginia may have little interest in protecting the victims, thereby retarding the fundamental substantive social policy of stopping interstate swindles.

In conclusion, this case is not one of those rare cases in which minimum requirements inherent in the concept of fair play and substantial justice defeat the reasonableness of jurisdiction even though the Defendants have purposefully engaged in forum activities.

Petitioners ask the Supreme Court of the United States grant the petitioners a Writ of Certiorari so that the Supreme Court can properly consider reversing the 11th Circuit Court of Appeals Decision on federal questions in ways that conflict with applicable decisions of the Supreme Court of the United States.

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 94-8371
NON-ARGUMENT CALENDAR

D.C. DOCKET NO. 1:93-CV-980 MHS

GEORGE GILMORE MARTIN,
JULIA S. MARTIN,

Plaintiffs-Appellants,

versus

BANK OF FLOYD, a
Virginia banking
corporation, et al.,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

(January 11, 1995)

Before DUBINA and BARKETT, Circuit Judges, and RONEY, Senior Circuit Judge.

PER CURIAM:

We affirm the district court's dismissal of this action for the reason of lack of personal jurisdiction over any of the defendants.

After the foreclosure against their property in Virginia of a mortgage they had executed before moving to Georgia, plaintiffs filed this action against the Bank and several attorneys and individuals involved in the foreclosure proceedings, alleging federal RICO and Georgia RICO causes of action.

The recitation of the facts in two paragraphs of the district court opinion is sufficient to reflect that the federal district court in Georgia did not have personal jurisdiction over the defendants:

> In this action, defendant Bank and defendant Moore have no office in Georgia, are not licensed to do business in Georgia, have no customers who reside in Georgia, and are aware of no revenue derived from Georgia. Defendants, Creech, Rake, and Warner are attorneys with defendant law firm, located in Roanoke, Virginia. None of these defendants reside in Georgia presently or at any time material to this action. None of these defendants practices law in Georgia or is licensed to practice law in Georgia. None of these defendants has an office or any other place of business of any kind in Georgia. Defendant law firm of Gentry, Locke, Rakes & Moore has no employees who reside in Georgia, is not licensed to transact business in Georgia, has no agents in Georgia, and does not regularly

> transact business or practice law in Georgia.
>
> The only action any of the defendants took with respect to Georgia was mailing two letters requesting updated financial statements and a foreclosure notice into Georgia, by certified mail, return receipt requested, as required by Virginia law in connection with the foreclosure of property. Every other act occurred in Virginia. The promissory note was executed in Virginia. The deed of trust was executed in Virginia. The real property is located in Virginia. The foreclosure occurred in Virginia. The property was advertised for sale in Virginia. The sale of property was conducted in Virginia. Subsequent sales of some lots to third parties occurred in Virginia.

Martin v. Bank of Floyd, et al., No. 1:93-cv-980-MHS, unpublished opinion at 6-7 (N.D. Ga. Mar. 1, 1994) (hereinafter referred to as "District Court Op. at __")

In keeping with the law recited in its Order, the district court correctly concluded that "by mailing letters requesting updated financial information to plaintiff's new address in Georgia and by subsequently mailing notice of foreclosure as required by Virginia law, the defendants did not purposefully do some act or

consummate some transaction with or in Georgia" and that the defendants, therefore, "do not have minimum contacts with Georgia which would make them amenable to service of process under the Georgia long-arm statute." District Court Op. at 7.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

GEORGE GILMORE MARTIN,
JULIA S. MARTIN,

Plaintiffs,

versus

BANK OF FLOYD, a
Virginia banking
corporation, et al.,

Defendants.

ORDER

This action is before the Court on two motions to dismiss or transfer by defendants. For the reasons stated below, the Court grants the motions to dismiss.

In May 1990, plaintiffs, who are pro se, borrowed money from defendant Bank of Floyd in Virginia and executed a note in the amount of $630,000. This note was secured by certain real property located in Virginia. Plaintiffs executed a deed of trust transferring this real

property to two trustees. About seven months later, plaintiffs moved to Georgia. On August 21, 1991, defendant Moore, Executive Vice President of defendant Bank of Floyd, sent a letter to plaintiffs which stated that plaintiffs must send current financial statements because federal regulations require FDIC-insured banks to have on file current financial statements of any borrower. A financial statement form accompanied the letter. On October 10, 1991, a letter essentially identical to the September 16 letter was sent to plaintiffs again, together with another financial statement form.

On September 16, 1991, defendant Bank of Floyd substituted the original trustees with defendant Creech, an attorney and partner in defendant law firm, Gentry, Locke, Rakes & Moore, located in Roanoke, Virginia. On November 19, 1991, defendant trustee Creech sent a certified mail-return receipt letter to

plaintiffs in which he informed them that he had been named substitute trustee, that the deed of trust and note secured were in default, that the noteholder and declared all the debts and obligations due and payable, and that the deed of trust would be foreclosed and the property sold under the terms specified in an attached notice. On November 21, 1991, plaintiff signed the return receipt. On November 26 and December 1, 1991, two advertisements for the property were run in a newspaper in Virginia. On December 4, 1991, defendant Bank foreclosed. There was only one bidder at the sale other than defendant bank. Defendant bank purchased the property at the foreclosure sale. Defendant Creech was paid a trustee commission. In January 1992, defendant law firm represented defendant bank in an action filed in Virginia against plaintiffs to recover the deficiency on the note plus attorney's fees.

In this action, plaintiffs allege that

defendants collectively engaged in forty-eight predicate acts of federal RICO and Georgia RICO. Plaintiffs also allege that defendant Creech and defendant bank entered into a conspiracy to breach and did breach fiduciary duties owed to them. Defendants Rakes, Creech, and Warner are attorneys employed by defendant law firm. Defendant Moore is an officer of defendant bank.

Defendants argue that the Court should dismiss plaintiffs' complaint for lack of personal jurisdiction. They argue that this Court's exercise of personal jurisdiction over defendants violates the Due Process Clause of the U.S. Constitution and that defendants are not amenable to service under the Georgia long-arm statute.

Before a federal court may exercise personal jurisdiction over a nonresident defendant, that defendant must be amenable to service of process and a constitutionally

sufficient relationship (minimum contacts) must exist between the nonresident defendant and the forum such that the exercise of jurisdiction is consistent with traditional notions of fair play and substantial justice. Omni Capital Int'l Ltd. v. Rudolf Wolff & Co., Ltd., 108 S. Ct. 404, 409 (1987). Federal Rule of Civil Procedure 4(e) states that if no federal statute with a service of process provision is applicable to an action, service of process is made according to the law of the state in which the district court sits.

No federal statute with a service of process provision is applicable to this action; therefore, service of process must be made under the Georgia long-arm statute, O.C.G.A. 9-10-91 (Supp. 1993). Subsection (1) of the Georgia long-arm statute applies only to claims based on contract. Delong Equip. Co. v. Washington Mills Abrasive Co., 840 F.2d. 843, 848 (11th Cir. 1988), cert. denied, 494 U.S. 1081 (1990).

Because the claims in this action are tort claims, jurisdiction must be premised on subsections (2) or (3) of the Georgia long-arm statute.[1] Although § 2 of the long-arm statute appears on its face to apply to torts committed within the state and § 3 appears to apply to torts committed without the state causing injury within the state, the Georgia courts have interpreted § 2 and § 3 to be essentially identical. Yarbrough v. Estate of Yarbrough, 173 Ga. App. 386, 387 (1985) (citing Clarkston

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[1]Subsection (2) reads, "commits a tortious act or omission within this state, except as to a cause of action for defamation of character arising from the act." O.C.G.A. § 9-10-91(2). Subsection (3) reads, "commits a tortious injury in this state caused by an act or omission outside this state if the tort-feasor regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state." O.C.G.A. § 9-10-91(3).

Power Flow, Inc. v. Thompson, 244 Ga. 300, 302 (1979).[2]

The following three-part test must be satisfied to comply with §§ 2 and 3 of the Georgia long-arm statute. Delong, 840 F.2d at 848-49.

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[2]In Clarkston Power, the court stated that "limitations similar to those present in subsection [(3)] are constitutionally mandated under subsection [(2)]." 244 Ga. at 301. However, the court then stated that "a nonresident defendant is subject to the jurisdiction of the Georgia courts only if he has established 'minimum contacts' in [Georgia] so that the exercise of jurisdiction is consistent with 'traditional notions of fair play and substantial justice.'" Id. (citing Int'l Shoe v. Washington, 326 U.S. 310, 316 (1945)). Although there appears to be some confusion about the limitations of subsection (2) as compared to those of subsection (3), the Eleventh Circuit has stated that the Georgia long-arm statute is to be interpreted to the maximum limits of due process. Delong, 840 F.2d at 849, n. 7. Thus, the following discussion of the Georgia long-arm statute includes the consideration of the same issues as those involved in determining the constitutionality of the exercise of personal jurisdiction by this court.

First, the "nonresident has purposefully done some act or consummated some transaction with or in the forum . . . The defendant need not be physically within the forum when this act or transaction occurs and a single such instance may suffice." Id. Second, "the [plaintiff] must have a legal cause of action in tort against the nonresident, which arises out of, or results from, the purposeful activity of the defendant involving [Georgia]." Id. Third, if the first two requirements are met, the exercise of jurisdiction must be "reasonable." Id.

In this action, defendant Bank and defendant Moore have no office in Georgia, are not licensed to do business in Georgia, have no customers who reside in Georgia, and are aware of no revenue derived from Georgia. Defendants Creech, Rake, and Warner are attorneys with defendant law firm, located in Roanoke, Virginia. None of these defendants resides in Georgia presently or at any time material to

this action. None of these defendants practices law in Georgia or is licensed to practice law in Georgia. None of these defendants has an office or any other place of business of any kind in Georgia. Defendant law firm of Gentry, Locke, Rakes & Moore has no employees who reside in Georgia, is not licensed to transact business in Georgia, has no agents in Georgia, and does not regularly transact business or practice law in Georgia.

The only action any of the defendants took with respect to Georgia was mailing two letters requesting updated financial statements and a foreclosure notice into Georgia, by certified mail, return receipt requested, as required by law.

Therefore, the Court GRANTS defendants' motions to dismiss [#5-1] [#7-1] for reason of lack of personal jurisdiction and DENIES AS MOOT defendants' motions to transfer [#5-2] [#7-2].

IT IS SO ORDERED, this 1st day of March, 1994.

\S\ Marvin H. Shoob
Marvin H. Shoob, Senior Judge
United States District Court
Northern District of Georgia

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

GEORGE GILMORE MARTIN,
JULIA S. MARTIN,

Plaintiffs-Appellants,

versus

BANK OF FLOYD, a
Virginia banking
corporation, et al.,

Defendants-Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

ON PETITION(S) FOR REHEARING

Before: DUBINA and BARKETT, Circuit Judges, and RONEY, Senior Circuit Judge.

PER CURIAM:

The petition(s) for rehearing filed by the appellants George Gilmore Martin and Julia S. Martin is denied.

ENTERED FOR THE COURT:

\S\ Joel F. Dubina
United States Circuit Judge

Supreme Court, U.S.
FILED
APR 14 1995

No. 94-1514

In The

Supreme Court of the United States

October Term, 1994

GEORGE GILMORE MARTIN and
JULIA S. MARTIN,

Petitioners,

vs.

BANK OF FLOYD, a Virginia banking corporation; GENTRY, LOCKE, RAKES & MOORE, a partnership; WILLIAM R. RAKES, individually, WILLIAM J. CREECH, JR., individually; G. HARRIS WARNER, JR., individually; and RONALD LEON MOORE, individually,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF RESPONDENTS BANK OF FLOYD AND RONALD LEON MOORE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Virginia Respondents subjected themselves to the jurisdiction of the Georgia District Court by mailing two form letters requesting an updated financial statement and a notice of foreclosure letter to the Petitioners in Georgia?

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No. 94-1514

In The

Supreme Court of the United States

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GEORGE GILMORE MARTIN and
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vs.

BANK OF FLOYD, a Virginia banking corporation; GENTRY, LOCKE, RAKES & MOORE, a partnership; WILLIAM R. RAKES, individually; WILLIAM J. CREECH, JR., individually; G. HARRIS WARNER, JR., individually; and RONALD LEON MOORE, individually,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF OF RESPONDENTS BANK OF FLOYD AND RONALD LEON MOORE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Come now Respondents Bank of Floyd and Ronald Leon Moore in the above-captioned matter and present this their Response to the Petition for Writ of Certiorari and show reasons why the writ should be denied.

STATEMENT OF THE CASE

On May 5, 1993, the Petitioners George Gilmore Martin and Julia S. Martin filed the present action in the United States District Court for the Northern District of Georgia ("the District Court") against Respondents Bank of Floyd (hereinafter "the Bank")[1], Ronald Leon Moore (hereinafter "Mr. Moore"), and others. The Petitioners have set forth four counts against some or all of the Respondents. These include claims for Federal RICO, Georgia RICO, breach of fiduciary duty, and conspiracy to breach fidicuary duties.

On March 1, 1994, the District Court granted the Bank's and Mr. Moore's Motion to Dismiss for lack of personal jurisdiction. That decision was unanimously affirmed by a three-judge panel of the United States Court of Appeals for the Eleventh Circuit. The Petitioners' Petition for Rehearing was denied.

The Petitioners' Statement of the Case fails to state the true facts of the case and is replete with misleading statements and inaccuracies. Instead of involving "fraudulent schemes," "intrinsically deceptive" letters, and a conspiracy to deprive the Petitioners of their property and money, this case concerns a simple, lawful foreclosure of real property located in Virginia.

The Bank is a Virginia corporation whose principal office is located in Floyd, Virginia. The Bank does not have an office or branch in the State of Georgia and does

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[1] Pursuant to Supreme Court Rule 29.1, and as noted in the Petitioners' List of All Parties, the Bank has no parent corporation and no non-wholly owned subsidiaries.

not advertise in the State of Georgia. It does not own, use or possess any real property in the State of Georgia, and does not hold a security interest on any real property located in the State of Georgia. There is no evidence that the Bank has any customers that reside in the State of Georgia. The Bank does not regularly engage in business in Georgia, solicit business in Georgia, or derive substantial revenue from goods used or consumed or services rendered in Georgia.

Mr. Moore, a Senior Executive Vice President and Chief Executive Officer of the Bank, is a resident of Floyd, Virginia. Mr. Moore does not own, use, or possess any real property in the State of Georgia. Mr. Moore does not regularly engage in or solicit business in the State of Georgia, and does not derive any revenue from goods used or consumed or services rendered in the State of Georgia.

The Petitioners resided in the State of Virginia until February, 1991. The Petitioners allege they are in the business of buying, subdividing, and selling real estate.

On or about May 15, 1990, the Petitioners executed a $630,000 Promissory Note to the Bank in Floyd, Virginia. To secure this loan, the Petitioners executed a Deed of Trust in favor of the Bank on the same date. The Deed of Trust transferred to Bruce W. Thompson and Dale Profitt, as Trustees, certain real property of the Petitioners located in Salem, Roanoke County, Virginia ("the Property") to secure the Promissory Note. Both the Promissory Note and the Deed of Trust were executed in the State of Virginia while the Petitioners were residents of the State of Virginia.

On or about August 21, 1991, and again on October 10, 1991, Mr. Moore, then Senior Executive Vice President and Chief Executive Officer of the Bank, sent to the Petitioners a standard form letter asking them to furnish an "up to date financial statement" as required by the terms of the Promissory Note and because federal regulations require FDIC-insured banks to have on file current financial statements for all borrowers. On or about September 16, 1991, the Bank executed a document entitled "Resignation of Trustee and Appointment of Substitute Trustee" removing Bruce W. Thompson as Trustee of the Property and replacing him with Respondent William J. Creech, Jr., a lawyer with the Respondent law firm of Gentry, Locke, Rakes & Moore ("the Law Firm").

Shortly therafter, the Petitioners defaulted on the Note and the Bank accelerated the indebtedness pursuant to the terms of the Note and declared the entire amount due and payable. On or about November 19, 1991, the Law Firm, on behalf of the Bank, sent a certified letter to the Petitioners advising them that their Note was in default and had been accelerated. The Petitioners were further advised that the Bank intended to institute foreclosure proceedings pursuant to the Deed of Trust. The Law Firm sent the letter to the Petitioners at their address at 6210 Aberdeen Drive, N.E., Atlanta, Georgia 30328 and at their address at 5596 Mitchell Road, No. 24, Atlanta, Georgia 30328. The Petitioners acknowledge receiving the letter and executing the return receipt on the letter, as is required for a valid foreclosure under Virginia law.

The Bank then advertised the Property for sale as follows:

> This sale is subject to filed and unfiled mechanics' liens, if any. This sale is further subject to any defects or exceptions to title arising prior to recordation of the Deed of Trust referenced herein.

The advertisements for the sale were published in the morning edition of the *Roanoke Times & World News* on Tuesday, November 26, 1991 and Tuesday, December 3, 1991 in Roanoke County, Virginia. The sale was scheduled for December 4, 1991. The Bank purchased the Property, with the exception of one lot, at the foreclosure sale.

In January, 1992, the Bank directed the Law Firm to sue the Petitioners for a deficiency judgment in Roanoke County Circuit Court, Roanoke County, Virginia. Mr. Moore executed an affidavit attesting to the deficiency. The Petitioners retained William Quillian, an attorney in Virginia, to represent them in connection with the action for the deficiency judgment.

Subsequently, the Bank began selling off lots from the Property which it then owned pursuant to the lawful foreclosure. All of these sales took place in Virginia. The Bank's and Mr. Moore's only contacts with the State of Georgia were mailing two form letters requesting an "up to date financial statement" and the November 19, 1991 notice of foreclosure letter to the Petitioners in Georgia.

SUMMARY OF ARGUMENT

The District Court and the Eleventh Circuit correctly ruled that the Bank and Mr. Moore are not subject to personal jurisdiction in Georgia. First, neither the Bank

nor Mr. Moore have any contacts with the State of Georgia. As such, maintenance of this suit against them in Georgia would offend "traditional notions of fair play and substantial justice." *Cable Home Communications v. Network Productions, Inc.*, 902 F.2d 829 (11th Cir. 1990). Neither Mr. Moore nor the Bank transact any business affairs in the State of Georgia. The Bank has no office in Georgia, is not licensed to transact business in Georgia, does not advertise in Georgia, does not solicit or regularly engage in business in Georgia, and has no customers in Georgia. Mr. Moore does not solicit or regularly engage in business in Georgia, or derive revenue from Georgia. All activities allegedly committed by the Bank and Mr. Moore were committed in the State of Virginia, and all actions remotely related to this case occurred in Virginia.

Furthermore, the District Court could not exercise jurisdiction over the Bank or Mr. Moore under Georgia's long-arm statute. *See* O.C.G.A. § 9-10-91. Neither the Bank nor Mr. Moore own, use, or possess real property in the State of Georgia, or transact any business in the State of Georgia. Furthermore, the evidence is abundantly clear that neither the Bank nor Mr. Moore committed any tortious acts in the State of Georgia. Accordingly, the District Court did not have personal jurisdiction over the Bank or Mr. Moore.

REASONS FOR DENYING THE WRIT

The question presented in the instant Petition is not novel. The Supreme Court has on several occasions clearly articulated the "minimum contacts" test for a

state's exercise of personal jurisdiction over a non-resident, and it is well-established that merely mailing three form letters into the forum state is wholly insufficient to satisfy that test. *See, e.g., Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985). Furthermore, there are no conflicting decisions from any federal appellate court or from the Georgia Supreme Court on this issue. Accordingly, the instant Petition satisfies none of the Supreme Court Rule 10.1 factors, and the Petition should be denied.

A federal court may only exercise personal jurisdiction over a nonresident defendent if the nonresident is amenable to service of process under the foreign state's long-arm statute or under a federal statute containing a service of process provision, *and* if "sufficient 'minimum contacts' exist to satisfy the Due Process Clause of the Fourteenth Amendment so that 'maintenance of the suit does not offend traditional notions of fair play and substantial justice'." *Cable Home Communications v. Network Productions, Inc.*, 902 F.2d 829, 855 (11th Cir. 1990) (quoting *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945), federal question case). *See also Brink's Mat. Ltd. v. Diamond*, 906 F.2d 1519, 1521 (11th Cir. 1990) (federal question and diversity of citizenship); *Delong Equip. Co. v. Washington Mills Abrasive Co.*, 840 F.2d 843 (11th Cir. 1988), *cert. denied*, 110 S. Ct. 1813 (1990) (federal question case); *Evans v. American Surplus Underwriters Corp.*, 739 F. Supp. 1526, 1529-30 (N.D. Ga. 1989) (diversity of citizenship case). A plaintiff bears the burden of establishing that personal jurisdiction exists over the nonresident defendant. *Stephens v. Coleman*, 712 F. Supp. 1571, 1574 (N.D. Ga.), *aff'd.*, 901 F.2d 1571 (11th Cir. 1989), *cert. denied*, 498 U.S. 998 (1990).

I. Neither Mr. Moore Nor The Bank Have Sufficient Minimum Contacts With The State Of Georgia.

The District Court and the Eleventh Circuit correctly found that neither Mr. Moore nor the Bank have sufficient "minimum contacts" with the State of Georgia to justify the exercise of personal jurisdiction over them. "The basic inquiry in a personal jurisdiction case . . . is whether the defendant has such minimum contacts with the forum so that the exercise of jurisdiction does not offend traditional notions of fair play and substantial justice." *Elec. Transaction Network v. Katz*, 734 F. Supp. 492, 499 (N.D. Ga. 1989). *See International Shoe Co., supra* at 310; *Evans, supra* at 1530. "The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations'." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72 (1985).

In *Burger King Corp.*, the Supreme Court set forth a two-pronged test to determine whether a court has personal jurisdiction over a non-resident: whether the defendant "purposefully established minimum contacts within the forum state," and, if so, "whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice'." *Id.* at 476. In determining whether minimum contacts exist, two factors are considered: foreseeability and purposeful availment. *Id.* The Eleventh Circuit Court of Appeals has stated:

> The foreseeability that is critical to due process analysis is that the defendant's conduct in connection with the forum state is such that he would reasonably anticipate being haled into court there. . . . The purposeful availment

> requirement seeks to ensure that a non-resident defendant 'will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts'. There must be some act by which he purposefully avails himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.

Elec. Transaction Network, supra, at 499 (citations omitted). *Accord Evans, supra,* at 1531.

The Supreme Court has stated that a defendant has ample warning that he may be subject to a state court's jurisdiction if he intentionally directs his conduct and activities at a state's residents and "the litigation results from alleged injuries that 'arise out of or relate to' those activities." *Burger King Corp., supra,* at 472. *See also DeLong Equip. Co., supra,* at 843 (some purposeful availment on the part of the defendant non-resident required before minimum contacts exist). Although the non-resident defendant's physical presence is not required in the forum state, the plaintiff's cause of action must "arise out of, or result from, the activity or activities of the defendant within the forum." *Shellenberger v. Tanner,* 138 Ga. App. 399, 404, 227 S.E.2d 266 (1976).

If sufficient minimum contacts exist, the court must address the second prong of *Burger King Corp., supra,* and review "reasonableness" factors to determine if the exercise of personal jurisdiction comports with fair play and substantial justice. *Elec. Transaction Network, supra,* at 499. "These factors include the burden on the defendant, the forum state's interest in adjudicating the dispute, the plaintiff's interest in obtaining efficient and effective

relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several states in furthering fundamental substantive social policies." *Id.*

It is abundantly clear that neither Mr. Moore nor the Bank has sufficient contacts with the State of Georgia to justify the exercise of personal jurisdiction over them by a federal court sitting in Georgia. Neither owns property in Georgia. Mr. Moore does not regularly engage in business in Georgia, derives no revenue from Georgia, and does not have an agent in Georgia. He has done nothing in Georgia such that he could reasonably anticipate being haled into court in Georgia. Clearly, the Petitioners' claims against Mr. Moore do not arise out of any activity of Mr. Moore in Georgia.

Likewise, the Bank has no office in Georgia, is not licensed to transact business in Georgia, does not advertise in Georgia, and has no agent in Georgia. The Bank has few, if any, customers in Georgia. It does not engage in business in Georgia, and derives little, if any, revenue from Georgia. It has done nothing in Georgia such that it would reasonably anticipate being haled into court in Georgia, and the Petitioners' claims against it do not arise out of any activity of the Bank in Georgia.

Furthermore, the State of Georgia has little interest in adjudicating the Petitioners' "dispute" with Mr. Moore and the Bank. The Deed of Trust and Promissory Note were executed in Virginia. The foreclosure action and sale took place in Virginia. The foreclosed Property is located in Virginia. The suit for a deficiency judgment was filed and pursued in a Virginia court. The two form letters

requesting financial information and the foreclosure notice letter were mailed by Respondents residing in and working in Virginia. Furthermore, the alleged breach of fidicuary duties by Mr. Creech and the Bank took place in the State of Virginia. The burden of all Respondents coming to Georgia to defend this litigation is great, as well. Accordingly, no "minimum contacts" are present and the exercise of personal jurisdiction over Mr. Moore and the Bank would violate traditional notions of fair play and substantial justice.

II. The Bank and Mr. Moore Are Not Amenable To Service Of Process Under Georgia's Long-Arm Statute Or Any Federal Statute Containing A Service Of Process Provision.

Even assuming Mr. Moore and the Bank have sufficient contacts with the State of Georgia such that the exercise of personal jurisdiction would not violate their due process rights, the District Court could not exercise jurisdiction over them under Georgia's long-arm statute or under Federal RICO's service of process provision. The Federal RICO service of process provision authorizes service of process on RICO defendants "residing in any other district" if "the ends of justice" require it. 18 U.S.C. § 1965(b). This nationwide service of process provision has severe limits, however. In order to invoke § 1965(b), it must be shown that the court has personal jurisdiction over at least one of the RICO defendants, and the plaintiff must demonstrate that "there is no other district in which a court will have personal jurisdiction over all of the alleged co-conspirators." *Butcher's Local Union No. 498 v. SDC Investment, Inc.*, 788 F.2d 535, 539 (9th Cir. 1986).

"[M]erely naming persons in a RICO complaint does not, in itself, make them subject to section 1965(b) nationwide service provisions." *Id. See also LeDuc v. Kentucky Cent. Life Ins. Co.*, 814 F. Supp. 820, 826 (N.D. Cal. 1992) (California court refuses to invoke 18 U.S.C. § 1965(b) because all defendants were subject to jurisdiction in Kentucky and none in California). Neither of these requirements are met in this case.

Like the Bank and Mr. Moore, none of the other Respondents have constitutionally sufficient contacts with Georgia. Respondents Creech, Rake, and Warner are all attorneys with Respondent the Law Firm, which is located in Roanoke, Virginia. None of these Respondents has an office or place of business in Georgia. None practices law in Georgia, or is licensed to practice law in Georgia. The Law Firm has no employees who reside in Georgia, has no agents in Georgia, does not regularly transact business in Georgia, and is not licensed to transact business in Georgia.

Furthermore, the Petitioners could have brought this action in Virginia, where all of the Respondents are subject to personal jurisdiction. Accordingly, the Petitioners are prohibited from using the Federal RICO service of process provision in an effort to create jurisdiction in Georgia over all of the Respondents.

The Bank and Mr. Moore are also not subject to service of process under Georgia's long-arm statute. Since this is not a divorce action and since neither Mr. Moore nor the Bank owns, uses or possesses real property in Georgia, the applicable provisions of Georgia's long-arm statute are as follows:

> A court of this State may exercise personal jurisdiction over any non-resident . . . as to a cause of action arising from any of the acts, omissions . . . enumerated in this Code, in the same manner as if he were a resident of this State, if in person or through an agent, he:
>
> (1) transacts any business within the State;
>
> (2) commits a tortious act or omission within the State, . . .
>
> (3) commits a tortious injury in this State caused by an act or omission outside the State if the tort-feasor regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this State.

O.C.G.A. §§ 9-10-91(1), (2), and (3).

Neither the Bank nor Mr. Moore has transacted business in Georgia for two reasons. First, O.C.G.A. § 9-10-91(1) only applies to claims based on contract. *Delong Equip. Co. v. Washington Mills Abrasive Co.*, 840 F.2d 848 (11th Cir. 1988), *cert. denied*, 494 U.S. 1081 (1990). Second, a non-resident has transacted business in Georgia if he or she "has purposefully done some act or consummated some transaction in the state, if the cause of action arises from or is connected with such act or transaction, and if the exercise of jurisdiction by the courts of this state does not offend traditional fairness and substantial justice." *Davis Metals, Inc. v. Allen*, 230 Ga. 623, 625, 198 S.E.2d 285 (1973). Further, "[m]ere telephone or mail contact with an out-of-state defendant, or even a defendant's

visit to this state are insufficient to establish the purposeful activity with Georgia required by the 'long-arm' statute." *Commercial Foods Specialties, Inc. v. Quality Food Equip. Co.*, 176 Ga. App. 892, 892, 338 S.E.2d 865 (1985). Again, since neither Mr. Moore nor the Bank has done anything in Georgia in connection with the Petitioners' claims other than mailing two form letters and one foreclosure notice letter into Georgia, they have not "transacted business" within the meaning of Georgia's long-arm statute.

Second, neither Mr. Moore nor the Bank has committed a tortious act or omission in Georgia. Again, the only action either Mr. Moore or the Bank took with respect to the State of Georgia was mailing three letters into the State of Georgia. As such, they clearly did not commit any such tort in the State of Georgia.

According to the Petitioners' Complaint, some of the Respondents allegedly breached fiduciary duties allegedly owed to the Petitioners by: (a) advertising the Property for sale in Virginia with clouded title; (b) advertising the sale of the Property only twice in Virginia; (c) conducting the sale in Virginia on December 4, 1991 between Thanksgiving and Christmas; (d) selling the Property at foreclosure when the only bidder was the Bank and one other unrelated third party; and (e) selling some of the Property to the Bank of Floyd at the foreclosure sale in Virginia. All of these activities took place in Virginia, and no such actions took place in Georgia.

Accordingly, neither Mr. Moore nor the Bank committed the torts of breach of fiduciary duty or conspiracy to breach fiduciary duties in the State of Georgia.

Finally, neither Mr. Moore nor the Bank committed a tortious injury in Georgia caused by an act or omission outside of Georgia. In order for this section of the long-arm statute to confer jurisdiction over a non-resident defendant, the Petitioners must show that the non-resident "regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in" Georgia. O.C.G.A. § 9-10-91(3). Neither Mr. Moore nor the Bank has engaged in any such activity in Georgia.

Neither Mr. Moore nor the Bank "regularly does or solicits business" in Georgia. The Bank has no office in Georgia, is not licensed to transact business in Georgia, does not advertise in Georgia, and its President is aware of no Bank customers who reside in Georgia. Neither Mr. Moore nor the Bank derive substantial revenue from goods used or consumed or services rendered in Georgia. In fact, Mr. Moore derives no revenue from Georgia, and the Bank, with no offices or branches in Georgia and not being licensed in Georgia, would only derive revenue from services rendered in Georgia to the extent any of its customers have relocated to Georgia with outstanding loans to the Bank. Mr. Moore has testified that he is aware of no such customers. Accordingly, neither Mr. Moore nor the Bank are subject to Georgia's jurisdiction pursuant to Georgia's long-arm statute. As such, the District Court correctly dismissed the Petitioners' Complaint against Mr. Moore and the Bank for lack of personal jurisdiction pursuant to Fed. R. Civ. P. 12(b)(2), and the Eleventh Circuit correctly affirmed that decision.

CONCLUSION

For the reasons set forth herein, Respondents Bank of Floyd and Ronald Leon Moore request that the instant Petition for Writ of Certiorari be denied.

Respectfully submitted,

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Supreme Court, U.S.
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No. 94-1514

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

GEORGE GILMORE MARTIN
and JULIA S. MARTIN,

Petitioners,

v.

BANK OF FLOYD, a Virginia banking corporation; GENTRY, LOCKE, RAKES & MOORE, a partnership; WILLIAM R. RAKES, individually; WILLIAM J. CREECH, JR., individually; G. HARRIS WARNER, JR., individually; and RONALD LEON MOORE, individually,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the district court, a Georgia forum, lacked personal jurisdiction over the defendant Virginia attorneys when their only contacts with Georgia were (1) sending the petitioners, who had moved from Virginia to Georgia, a notice of foreclosure on collateralized Virginia property in connection with the petitioners' default on a loan obtained by the petitioners, when they were Virginia residents, from a Virginia bank and (2) serving the petitioners with a summons in connection with the subsequent deficiency action brought by the attorneys on behalf of the Virginia bank.

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OPINIONS BELOW

The decision of the Court of Appeals for the Eleventh Circuit is unreported, but is reprinted in the Petition for Writ of Certiorari on pages 25-28. The Eleventh Circuit Court of Appeals' denial of the petitioners' Petition for Rehearing is also unreported, but is reprinted in the Petition for Writ of Certiorari on page 39. The Order of the United States District Court for the Northern District of Georgia is also unreported, but is reprinted in the Petition for Writ of Certiorari on pages 29-38.

GROUNDS FOR JURISDICTION

Jurisdiction to consider the Petition exists under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions are relevant and are set forth in the Appendices: U.S. Const. Amend. V; 18 U.S.C. § 1965(b); O.C.G.A. § 9-10-91; and O.C.G.A. § 9-10-94.

STATEMENT OF THE CASE

1. Procedural Facts

On May 5, 1993, the petitioners George Gilmore Martin and Julia S. Martin filed this action in the United States District Court for the Northern District of Georgia against William R. Rakes ("Mr. Rakes"), William J. Creech, Jr. ("Mr. Creech"); G. Harris Warner, Jr. ("Mr. Warner") (referred to collectively as "the attorneys"); Gentry, Locke, Rakes & Moore ("the law firm"); Ronald Leon Moore ("Mr. Moore"); and Bank of Floyd ("the bank"). (R1-1-1.) All defendants filed motions to dismiss

on the grounds that the complaint failed to state a claim upon which relief could be granted and that the court lacked personal jurisdiction over them. (R1-7-1.) Judge Marvin H. Shoob, in an order dated March 1, 1994 and entered March 3, 1994, granted their motions to dismiss on the grounds that the Northern District of Georgia lacked personal jurisdiction over them. (R1-16-1, R1-17-1.)

The Court of Appeals for the Eleventh Circuit affirmed the district court's order and then denied the petitioners' motion for rehearing. The petitioners have now filed in this Court a Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

2. Statement of Facts

Gentry, Locke, Rakes & Moore is a prominent and reputable Virginia law firm with offices in Roanoke, Virginia. (R1-7-Affidavit of William J. Creech, Jr., ¶ 6.) The law firm has no employees who reside in Georgia, does not regularly transact business or practice law in the state of Georgia, is not licensed to transact business in the state of Georgia, and has no agents in Georgia. (R1-7-Creech Aff., ¶ 6.)

Mr. Rakes,[1] Mr. Creech, and Mr. Warner were at all times pertinent to this action members of this law firm. At no time material to this case have any of these attorneys practiced law in Georgia, been licensed to practice law in Georgia, resided in Georgia, or maintained any office or place of business of any kind in Georgia. (R1-7-Creech Aff., ¶¶ 3-4, 8-9.) The attorneys' and their law firm's first contact with the petitioners occurred when the Bank of Floyd, a Virginia bank with its principal office in Floyd County, Virginia, retained the attorneys and their law firm to act as trustees in connection with the Bank's

[1]At the time the lawsuit was filed, Mr. Rakes was serving as the President of the Virginia State Bar.

foreclosure on certain secured property owned by the petitioners. (R1-5-Affidavit of Ronald Leon Moore, ¶5; R1-7-Creech Aff., ¶ 12.)

The petitioners, while residents of Virginia, had executed a $630,000 promissory note to the Bank of Floyd and, to secure this loan, executed a deed of trust in favor of the Bank contemporaneous with the loan. (R1-1-3,4.) Both the promissory note and the deed of trust were executed in the Commonwealth of Virginia while the petitioners were residents of Virginia. (R1-5-Moore Aff., ¶ 7; R1-7-Creech Aff., ¶ 11.)

The petitioners defaulted on this loan and moved to Georgia, and the Bank of Floyd instituted foreclosure proceedings on the property securing the loan. (R1-7-Creech Aff., ¶ 12.) William J. Creech was appointed as a substitute trustee under the deed of trust, an appointment which was expressly allowed by the terms of the deed of trust. (R1-1-8,50.) As required by Virginia law, Mr. Creech, in his position as substitute trustee, sent a letter to the petitioners on November 19, 1991 advising them that their note was in default, that the amount due under the note had been accelerated, and that the Bank of Floyd intended to foreclose on its security interest in the property under the deed of trust. (R1-7-Creech Aff., ¶ 13, Ex. B.) In further compliance with Virginia law governing foreclosure proceedings, the subject property was advertised for sale in a local Virginia newspaper. (R1-1-21,22,69.)

On December 4, 1991, Mr. Creech, acting pursuant to his powers as trustee under the deed of trust, sold the subject real property at public auction. (R. 1-1-23.) At this auction, the Bank of Floyd submitted bids on all but one of the lots comprising the subject property. (R1-1-23.) The Bank's bids, although higher than the bids of all others, were for an amount less than the outstanding unpaid balance on the petitioners' promissory note obligation. (R1-1-23.) Following the auction, Mr. Creech, acting as trustee under the deed of trust, transferred this property to

the Bank on December 16, 1991. (R1-1-23.) Mr. Creech, as compensation for his services as trustee, charged the Bank of Floyd a commission of $7,500. (R1-1-23.)

Although the Bank of Floyd purchased the subject property at an auction, the auction did not sufficiently cover the petitioners' obligation under the promissory note. (R1-1-25.) In an attempt to collect the remainder of the money that the petitioners' owed the Bank of Floyd, the Bank of Floyd retained the attorneys and their law firm to sue the petitioners for the deficiency amount. (R1-1-24.) As required by Virginia law, the petitioners were served with the summons in Georgia by the Secretary of the Commonwealth of Virginia. (R1-1-24,27.)

Despite the pending Virginia deficiency action, which afforded the petitioners an opportunity to bring each of the claims alleged in their complaint, the petitioners filed this complaint in the Northern District of Georgia on May 5, 1993. (R1-1-1.) Nonetheless, the petitioners continued to defend themselves in the Virginia deficiency action, which was tried on October 15, 1993 and resulted in a judgment in favor of the Bank of Floyd for damages in the sum of $170,183.27 and for attorneys' fees in the amount of $42,545.82.[2] The petitioners then appealed this decision to the Virginia Supreme Court, and on April 5, 1994 the Virginia Supreme Court dismissed their appeal.[3]

These facts, which describe a standard foreclosure proceeding and subsequent deficiency action, are undisputed. Although the petitioners do not dispute these facts, they have, by asserting numerous conclusory and unsupported allegations

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[2]As this decision is unpublished, the order entered on December 9, 1993 by the Circuit Court for the County of Roanoke is reprinted as Exhibit A to this brief. This judgment was entered before the district court issued its order dismissing the attorneys and their law firm, but it is not part of the district court's record in this case.

[3]As this decision is unpublished, the Virginia Supreme Court's decision dismissing the appeal is reprinted as Exhibit B to this brief. This decision by

of fraud and conspiracy, attempted to allege that the attorneys and their law firm violated Federal RICO statutes, violated Georgia RICO statutes, breached fiduciary duties, and conspired to breach fiduciary duties. (R1-1-1, 45.) In fact, the petitioners have, in their Petition, described this valid foreclosure and subsequent deficiency action as "criminal". (Petition at 1.) The attorneys and their law firm vigorously dispute any insinuation of impropriety in their handling of the Virginia foreclosure and the Virginia deficiency action.

SUMMARY OF THE ARGUMENT

The decision of the United States Court of Appeals for the Eleventh Circuit was correct, and this case meets none of the criteria of Supreme Court Rule 10.1 for granting a writ of certiorari. There are simply no "special and important reasons" for this Court to duplicate the Eleventh Circuit's review of the record and application of the well-established law of personal jurisdiction to the particular facts of this case.

The Eleventh Circuit was correct in holding that the district court lacked personal jurisdiction over the individual attorneys and their law firm. Due process mandates that before a court can exercise jurisdiction over a defendant, the defendant must have constitutionally-sufficient contacts with the forum and also be amenable to service of process. In this case, the individual attorneys and their law firm do not meet either of these requirements.

In order to have a constitutionally-sufficient relationship with the forum, a defendant must purposefully establish minimum contacts with the forum, and the forum's exercise of personal jurisdiction over the defendant must comport with traditional notions of fair play and substantial justice. In this

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the Supreme Court of Virginia was issued one month after the district court's order dismissing the attorneys and their law firm in this case. As such, it was not a part of the district court's record in this case.

case, the individual attorneys and their law firm did not have minimum contacts with Georgia because they have not purposefully availed themselves of the protections and benefits of Georgia law. Their only reason for having any association with Georgia was that the petitioners defaulted on a loan and moved to Georgia, thus requiring the attorneys and their law firm to provide them with notice in Georgia of the pending Virginia foreclosure and subsequent Virginia deficiency action. Thus, the individual attorneys and their law firm did not purposefully avail themselves of the protection of Georgia law.

Likewise, traditional notions of fair play and substantial justice dictate that the individual attorneys and their law firm are not subject to personal jurisdiction in Georgia. The petitioners had every opportunity and every motivation to litigate these allegations in the Virginia deficiency action. The petitioners, having already had one opportunity to contest the validity of the foreclosure and of the deficiency action, should not be allowed to relitigate these allegations in Georgia.

Even if the individual attorneys and their law firm have established constitutionally-sufficient contacts with Georgia, they are not subject to personal jurisdiction because they are not amenable to service of process. Neither the RICO service of process statute nor the Georgia long-arm statute authorizes service of process on them. The RICO service of process statute, which allows nationwide service of process, only applies if one defendant is subject to personal jurisdiction in the forum and if no other forum exists where all defendants are subject to personal jurisdiction. It is inapplicable in this case because none of the defendants are subject to personal jurisdiction in Georgia and because all are subject to personal jurisdiction in Virginia. Finally, the Georgia long-arm statute does not authorize service of process in this case because the individual attorneys and their law firm have not engaged in any of the

acts specified by that statute as conferring jurisdiction to a Georgia court over a non-resident defendant.

The attorneys and their law firm are not subject to personal jurisdiction in Georgia because they do not have constitutionally-sufficient contacts with Georgia and are not amenable to service of process. Thus, this Court should deny the Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I. The Law Governing Personal Jurisdiction Is Well-Settled, and the Eleventh Circuit's Decision Does Not Alter These Established Principles.

The Due Process Clause of the fifth amendment to the United States Constitution provides that "[no] person shall be deprived of life, liberty, or property, without due process of law . . . ." U.S. Const. Amend. V. In a long line of cases, this Court has interpreted this provision as prohibiting a federal court from exercising power over a defendant unless the court possesses personal jurisdiction over that defendant. *See, e.g, Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72 (1985); *Insurance Corp. of Ireland v. Compagnie Des Bauxites De Guinne*, 456 U.S. 694, 702 (1982); *International Shoe v. Washington*, 326 U.S. 310, 316 (1945). "The personal jurisdiction requirement recognizes and protects an individual liberty interest [and] represents a restriction on judicial power . . . as a matter of individual liberty." *Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987) (quoting *Insurance Corp. of Ireland*, 456 U.S. at 702).

This Court has long employed a two-prong test for determining whether a court's exercise of jurisdiction over a defendant complies with the Due Process Clause:

(1) the defendant must possess a constitutionally-sufficient relationship with the forum; and

(2) the defendant must be amenable to service of summons.[4]

Omni Capital Int'l, 484 U.S. at 104; *see also, Delong Equipment Co. v. Washington Mills*, 840 F.2d 843 (11th Cir. 1988) In the case at bar, as the Eleventh Circuit properly recognized, the petitioners have failed to establish the existence of either prong.

II. The Individual Attorneys and Their Law Firm Do Not Have a Constitutionally-Sufficient Relationship with Georgia.

This Court has established a two-part test for determining whether a defendant has a constitutionally-sufficient relationship with the forum:

(1) the defendant must purposefully establish sufficient "minimum contacts" with the forum; and

(2) the forum's exercise of personal jurisdiction over the defendant must comport with "traditional notions of fair play and substantial justice."

International Shoe 326 U.S. 310 (1945). This test, which determines the "constitutionality sufficient relationship" prong of the personal jurisdiction test, is well-established and in no dispute. In this case, as the Eleventh Circuit held, the petitioners have failed to establish either part of the *International Shoe* test for determining whether a constitutionally-sufficient relationship exists between the lawyers and the State of Georgia.

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[4] This Court has employed the same test regardless of whether the personal jurisdiction requirement flowed from the fifth amendment, *Omni Capital Int'l*, 484 U.S. at 103-104 (applying test to personal jurisdiction in federal court), or from the fourteenth amendment, *International Shoe*, 326 U.S. 310, 316 (1949) (applying test to personal jurisdiction in state court). Thus, cases such as *International Shoe*, which were decided under the fourteenth amendment, "provide guidance in determining whether due process is satisfied here." *In re Chase & Osborn Corp.*, 835 F.2d 1341, 1345 (11th Cir. 1988) *rev'd on other grounds sub nom. Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989).

A. The Attorneys Have Not Established Minimum Contacts with Georgia Because They Have Not Purposefully Availed Themselves of the Privilege of Conducting Activities Within the State of Georgia.

"[U]nilateral activity of those who claim some relationship with a non-resident defendant cannot satisfy the requirement of contact with the forum state." *Woodson World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) (quoting *Hanson v. Denckla*, 357 U.S. 235,253 (1958)). Rather, the touchstone of "minimum contacts" is "that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Burger King v. Rudzewicz*, 471 U.S. 462 (1985)(quoting *Hanson*, 357 U.S. at 253)).

The primary basis for the Eleventh Circuit's decision was that the attorneys and their law firm in the case at bar have in no way purposefully availed themselves of the benefits and protections of Georgia law. The Eleventh Circuit noted that the attorneys' contacts with Georgia were merely incidental to their purposeful attempt to avail themselves of the protections of the laws of the Commonwealth of Virginia. (Decision of the Eleventh Circuit, reprinted at p. 29of Petition for Certiorari.) After the petitioners defaulted on a loan they had obtained from the Bank of Floyd, Mr. Creech, a resident of Virginia, acted as trustee during the Bank's subsequent foreclosure and sale of the petitioners' Virginia property securing the loan. (R1-7-Creech Aff.,¶ 12.) The sale of these properties failed to satisfy the petitioners' debt to the Bank, and the Bank then retained the attorneys and their law firm to represent it in an action brought in Roanoke, Virginia against the petitioners to recover this deficiency. (R1-7-Creech Aff., ¶ 12;R1-5-Moore Aff., ¶ 6.) All of these activities occurred in Virginia; none took place in Georgia.

The only contacts that any of the attorneys had with Georgia were to mail a letter to the petitioners advising them that their note was in default and to employ Virginia's service of process procedure to bring a deficiency action against the petitioners in Virginia. (R. 1-1-32;R. 1-7-Creech Aff., ¶ 13.) Those two communications, both of which were required by Virginia law, represent the totality of the attorneys' contacts with the state of Georgia. Further,the only reason that the attorneys had this slight contact with Georgia was because of the unilateral decision by the petitioners to move to Georgia.

This Court has consistently refused to allow "the unilateral activity of those who claim some relationship with a nonresident defendant [to] satisfy the requirement of contact with the forum State." *Kulko v. Superior Court of California*, 436 U.S. 84 (1978) (quoting *Hanson*, 357 U.S. at 253)). In this case, the unilateral act of the petitioners moving to Georgia provided the sole reason for any contact by the attorneys with Georgia. As such, this Court's long line of cases holding that the unilateral act of one party cannot create the requisite minimum contacts prohibited the trial court from exercising personal jurisdiction over the defendants. *See, e.g., Kulko*, 436 U.S. at 94-95 (holding that New York resident had not purposefully availed himself of the benefits of California law when his children and former wife moved to California and instituted a child support action against him there); *Woodson*, 444 U.S. at 297-98 (holding that New York automobile retailer and distributor did not purposefully avail themselves of the benefits of Oklahoma law simply because they sold a car to a customer who had an accident after driving the car to Oklahoma).

The petitioners in the case at bar, like the mother and children in *Kulko* and the automobile purchaser in *Woodson*, are attempting to drag a non-resident defendant into the forum of their choice based solely upon their unilateral conduct. The petitioners, not the attorneys and their law firm, chose to move to

Georgia. Further, the individual attorneys and their law firm, like the father in *Kulko* and the retailer and wholesaler in *Woodson*, have absolutely no contacts with the forum state except for that prompted by the unilateral conduct of the petitioners.

The attorneys, all Virginia residents, simply represented a Virginia bank (1) in the foreclosure of Virginia property owned by the petitioners, Virginia residents who had defaulted on their loan and moved to Georgia, and (2) in a subsequent deficiency action brought in Virginia against the petitioners. The attorneys and their law firm, by representing Virginia clients in a Virginia foreclosure and in a Virginia lawsuit, have done nothing to avail themselves of the protection of Georgia law. Thus, they are not subject to the jurisdiction of the United States District Court for the Northern District of Georgia.

B. Even If the Attorneys and Their Law Firm Have Established Minimum Contacts with Georgia, Traditional Notions of Fair Play and Substantial Justice Prohibit the District Court from Exercising Personal Jurisdiction over Them.

The second prong of the *International Shoe* test requires that the exercise of personal jurisdiction over a defendant must "comport with `fair play and substantial justice.'" *Burger King*, 471 U.S. at 476 (quoting *International Shoe*, 326 U.S. at 320)). This Court has listed five factors that should guide a court's determination of whether the exercise of personal jurisdiction"comports with `fair play and substantial justice:'"

(1) the burden on the defendant,
(2) the forum's interest in adjudicating the dispute,
(3) the plaintiffs' interest in obtaining convenient and effective relief,
(4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and
(5) the shared interest of the several States in furthering fundamental substantive social policies.

Asahi Asahi Metal Industry Co. v. Superior Court of California, 480 U.S. 102 (1986). These factors all weigh heavily against the exercise of personal jurisdiction in Georgia over the individual attorneys and their law firm.

First, the burden on the individual attorneys and their law firm in defending this action in Georgia is great. The law firm and the individual attorneys are Virginia residents. All witnesses, except the petitioners, reside in Virginia. (R. 1-7-Creech Aff., ¶ 10.) All events in the allegedly conspiratorial foreclosure occurred in Virginia. No activity occurred in Georgia. Forcing these defendants, a Virginia law firm and three Virginia attorneys, to defend this action in Georgia solely because the petitioners unilaterally chose to move to Georgia runs counter to the notions of fair play and substantial justice.

Second, Georgia has no interest in adjudicating this dispute. All allegedly wrongful acts occurred in Virginia among Virginia residents relating to Virginia property. Virginia law governed the deficiency action and all aspects of the petitioners' dealings with the Bank of Floyd, including their execution of the promissory note and deed of trust as well as the foreclosure and subsequent sale of their property securing the defaulted loan. Georgia substantive law has no application to any aspect of this case. (R. 1-7-Creech Aff., ¶ 11.) Thus, Georgia has no interest in adjudicating this action.

The third factor, the petitioners' interest in obtaining convenient and effective relief, also weighs heavily in favor of the attorneys because the petitioners have already had an opportunity to obtain the very relief sought in this action. The allegations contained in the petitioners' complaint represent nothing more than an attack on the validity of both the foreclosure and the subsequent deficiency action. As such, the petitioners had every opportunity *and every motivation* to litigate these allegations in the Virginia deficiency action, either as counterclaims or as defenses.

The fourth factor, obtaining the most efficient resolution of controversies, also militates against the exercise of personal jurisdiction over the attorneys and their law firm. The most efficient resolution of this controversy will occur if the Virginia deficiency action serves as the final resolution for these claims. The petitioners, having lost the Virginia deficiency action, nevertheless continue in this appeal to pursue an entirely different action in the Northern District of Georgia based upon the exact same set of facts as was the Virginia deficiency action. Thus, the petitioners cannot claim that jurisdiction over the attorneys and their law firm promotes "the most efficient resolution of controversies." *Woodson*, 444 U.S. at 292.

Finally, the last factor, the interest of the "several States in furthering fundamental substantive social policies," *id.*, is not furthered by the exercise of jurisdiction in Georgia. Virginia's protection of persons from fraud or conspiracy, if proved, is no less than Georgia's. Thus, there is no "potential clash of the forum's law with the fundamental substantive social policies of another state." *Burger King*, 471 U.S. at 477.

Each of the five *Asahi* factors supports the district court's conclusion that it did not possess personal jurisdiction over the attorneys and their law firm. "Traditional notions of fair play and substantial justice" do not require the individual attorneys and their law firm to relitigate the Virginia deficiency action in the Northern District of Georgia. *See id.* at 477-78. Thus, the Eleventh Circuit was correct in affirming the district court's decision dismissing the attorneys and their law firm for lack of personal jurisdiction.

III. Even If the Attorneys and Their Law Firm Have a Constitutionally-Sufficient Relationship with Georgia, They Are Not Subject to Personal Jurisdiction in This Case Because They Are Not Amenable to Service of Process.

Even if a defendant has a constitutionally-sufficient relationship with the forum, a court still cannot exercise personal

jurisdiction over the defendant unless there is "a basis for the defendant's amenability to service of summons. Absent consent, this means there must be authorization for service of summons on the defendant." *Omni Capital Int'l*, 484 U.S. at 104; *see also, Brink's Mat Ltd. v. Diamond*, 906 F.2d 1519, 1521 (11th Cir. 1990). Thus, even if the individual attorneys and their law firm have a constitutionally-sufficient relationship with Georgia, they are not subject to personal jurisdiction in Georgia unless "there is authorization to serve summons in this litigation." *Omni Capital Int'l*, 484 U.S. at 104.

Federal Rule of Civil Procedure 4(e) governs service of process on an out-of-state defendant in a federal civil case. *Delong Equipment Co.*, 840 F.2d at 847. This rule provides that service of process is appropriate under either a federal statute containing a service of process provision or under the long-arm statute of the state in which the district court sits. *Id.*

Applying this rule to the case at bar, the district court could only exercise jurisdiction over the attorneys and their law firm if either the RICO service of process provision, 18 U.S.C. § 1965(b), or the Georgia long-arm statute, O.C.G.A. § 9-10-91 *et seq*, authorizes service of process on them. Neither provision, however, authorizes service of process in this case.

A. The RICO Service of Process Provision Is Inapplicable to This Case Because None of the Defendants Are Subject to Jurisdiction in Georgia and Because All of the Defendants Are Subject to Personal Jurisdiction in the United States District Court for the Western District of Virginia.

The RICO service of process provision authorizes service of process upon RICO defendants "residing in any other district" if "it is shown that the ends of justice require [it]." 18 U.S.C. § 1965(b). Although this provision provides for nationwide service of process, it is not without limits:

> For nationwide service of process to be imposed under § 1965(b), the court must have personal jurisdiction over at least one of the participants in the alleged multi-district conspiracy and the plaintiff must show that there is no other district in which a court will have personal jurisdiction over all of the alleged co-conspirators.

Butcher's Union Local No. 498 v. SDC Investment, 788 F.2d 535, 539 (9th Cir. 1986) Thus, a plaintiff cannot choose the forum in which to litigate a RICO action by merely filing a complaint in the district of his choice. "Merely naming persons in a RICO complaint does not, in itself, make them subject to § 1965(b) nationwide service provisions." *Id; LeDuc v. Kentucky Cent. Life Ins. Co.*, 814 F. Supp. 820, 826 (N.D. Cal. 1992).

In this case, the petitioners cannot rely upon § 1965(b) because neither requirement is met.[5] The Northern District of Georgia does not have personal jurisdiction over *any* of the defendants, and another district exists that would have personal jurisdiction over *all* of the defendants. As discussed in Section II of this brief, the Northern District of Georgia does not have personal jurisdiction over *any* of the defendants in this action because none have constitutionally-sufficient contacts with Georgia. In this case, the petitioners could have brought this action in Virginia, where all of the defendants are subject to personal jurisdiction. The petitioners, therefore, are prohibited from using the RICO service of process provision to create jurisdiction over these defendants in Georgia.[6]

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[5]Aside from considerations about when the RICO service of process provision applies, another more simple reason exists as to why the plaintiffs cannot use this provision in this case — their complaint fails to state a RICO claim.

[6]Moreover, the nationwide service of process statute is not immune from constitutional scrutiny. For the reasons elaborated earlier in this brief, any exercise of personal jurisdiction in Georgia over these defendants in the factual context of this case and pursuant to that statute would offend against *all* of the most basic principles of due process.

B. The Georgia Long-Arm Statute Does Not Authorize Service of Process Over the Individual Attorneys or Their Law Firm.

The Georgia long-arm statute, O.C.G.A. § 9-10-91 *et seq.*, authorizes service of process on a non-resident who is "subject to the jurisdiction of the courts of the state under Code Section 9-10-91." O.C.G.A. § 9-10-94 . The individual attorneys and their law firm, however, are not subject to jurisdiction under O.C.G.A. § 9-10-91 because they do not meet the specific requirements set forth in this statute.

The petitioners cannot avail themselves of the Georgia long-arm statute merely by demonstrating that the attorneys and their law firm somehow established constitutionally-sufficient contacts with Georgia. "In Georgia, a due process analysis is appropriate only after it is first established that the non-resident defendant committed one of the acts described in the Long Arm Statute." *Simplex-Rapid di Boschiero v. Italia Assicurazioni*, 209 Ga. App. 121, 121, 433 S.E.2d 309, 310 (1993) (quoting *McDonnell v. Roy E. Beatty & Assocs.*, 203 Ga. App. 807, 808-09, 418 S.E.2d 95, 96 (1992)); *accord Showa Denko K.K. v. Pangle*, 202 Ga. App. 245, 247, 414 S.E.2d 658, 660 (1991) (analyzing the long-arm statute separately from due process considerations). These recent cases from the Georgia Court of Appeals indicate that jurisdiction under the Georgia long-arm statute is not conterminous with due process.[7]

[7]The attorneys and their law firm acknowledge that the Eleventh Circuit has previously held "that the Georgia long-arm statute is to be interpreted to the maximum limits of due process." *Delong Equipment Co.*, 840 F.2d at 849 n.7. The holding in *Delong*, however, was made prior to the decisions of the Georgia Court of Appeals cited above. Accordingly, the attorneys and their law firm invite this Court to recognize, as did Judge Murphy of the Northern District of Georgia, that "the elements of federal due process, i.e., minimum contacts and traditional notions of fair play and substantial justice, do not subsume the [long-arm] statute and make it superfluous, instead, they help focus the analysis after one of the five statutory requirements has been met." *Howell v. Komori America Corp.*, 816 F. Supp. 1547, 1552 (N.E. Ga. 1993).

The petitioners in this case must, therefore, establish that the attorneys and their law firm are subject to jurisdiction under the specific requirements of O.C.G.A. § 9-10-91. Absent this showing, the plaintiffs cannot succeed even if the attorneys and their law firm have established constitutionally-sufficient contacts with Georgia.

The Georgia long-arm statute allows Georgia courts to exercise jurisdiction over a non-resident in five circumstances, only two of which, subparagraphs (2) and (3), are relevant to tort cases. O.C.G.A. § 9-10-91(2), while applicable to tort cases, does not apply to this case. It allows jurisdiction over a non-resident if the non-resident "commits a tortious act or omission within this state . . . ." O.C.G.A. § 9-10-91 (2). This provision does not apply in situations where the alleged tortious acts were committed outside of Georgia and caused injury in Georgia. *Gust v. Flint*, 257 Ga. 129, 130, 356 S.E.2d 513, 514 (1987) (holding provision inapplicable when non-resident negotiated by mail and telephone with Georgia residents and allegedly defrauded the Georgia residents in the transaction). It does not, therefore, provide petitioners with a valid basis for service of process on the attorneys.

Likewise, the individual attorneys and their law firm are not subject to personal jurisdiction in Georgia under § 9-10-91(3) of the Georgia long-arm statute. This statute authorizes personal jurisdiction over a non-resident who

> "commits a tortious injury in this state caused by an act or omission outside the state ***if*** the tort-feasor regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or service rendered in this state."

O.C.G.A. § 9-10-91(3) (emphasis added). Neither the individual attorneys nor their law firm regularly transacts business or practices law in the State of Georgia, is licensed to transact business in the State of Georgia, or has an agent in the State of Georgia. (R1-7-Creech Aff., ¶¶ 3-9.)

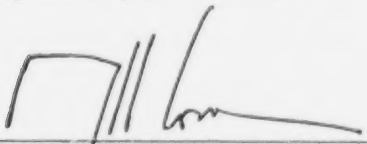
In fact, the only contact with Georgia by any of the attorneys or their law firm was the foreclosure notice and service of process mailed to the petitioners. Thus, neither the individual attorneys nor their law firm have maintained the degree of systematic contacts contemplated by O.C.G.A. § 9-10-91(3). *See McKin v. Gilbert*, 208 Ga. App. 788, 791, 432 S.E.2d 233, 235-36 (1993).

No provision of the Georgia long-arm statute authorizes service of process over the individual attorneys or their law firm. The individual attorneys and their law firm simply are not amenable to service of process in Georgia. The Eleventh Circuit, therefore, was correct in holding that the district court lacks personal jurisdiction over the individual attorneys and their law firm.

CONCLUSION

For the reasons set forth above, this case meets none of the criteria for granting writs of certiorari. There are no "special and important reasons" for this Court to duplicate the task of reviewing the record in this case and applying the established law of personal jurisdiction to this record merely to reach the same conclusions as the Eleventh Circuit. The individual attorneys and their law firm are not subject to personal jurisdiction in Georgia because they have not established constitutionally-sufficient contacts with Georgia and are not amenable to service of process. Accordingly, this Court should deny the petitioner's request for a writ of certiorari.

Respectfully submitted,



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APPENDIX "A"

U.S. Const. Amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX "B"

18 U.S.C. § 1965 - Venue and Process

(a) Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.

(b) In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

(c) In any civil or criminal action or proceeding instituted by the United States under this chapter in the district court of the United States for any judicial district, subpoenas issued by such court to compel the attendance of witnesses may be served in any other judicial district, except that in any civil action or proceeding no such subpoena shall be issued for service upon any individual who resides in another district at a place more than one hundred miles from the place at which such court his held without approval given by a judge of such court upon a showing of good cause.

(d) All other processes in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

APPENDIX "C"

O.C.G.A. § 9-10-91 - Grounds for exercise of personal jurisdiction over nonresident.

A court of this state may exercise personal jurisdiction over any nonresident of his executor or administrator, as to a cause of action arising from any of the acts, omissions, ownership, use, or possession enumerated in this Code section, in the same manner as if he were a resident of the state, if in person or through an agent, he:

(1) Transacts any business within this state;

(2) Commits a tortious act or omission within this state, except as to a cause of action for defamation of character arising from the act;

(3) Commits a tortious injury in this state caused by an act or omission outside this state if the tort-feasor regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;

(4) Owns, uses, or possesses any real property situated within this state; or

(5) With respect to proceedings for alimony, child support, or division of property in connection with an action for divorce or with respect to an independent action for support of dependents, maintains a matrimonial domicile in this state at the time of the commencement of this action or, if the defendant resided in this state preceding the commencement of the action, whether cohabiting during that time or not. This paragraph shall not change the residency requirement for filing an action for divorce.

O.C.G.A. § .9-10-94 - Service

A person subject to the jurisdiction of the courts of the state under Code Section 9-10-91, or his executor or administrator, may be served with a summons outside the state in the same manner as service is made within the state by any person authorized to make service by the laws of the state, territory, possession, or country in which service is made or by any duly qualified attorney, solicitor, barrister, or the equivalent in such jurisdiction.

EXHIBIT "A"

IN THE CIRCUIT COURT
FOR THE COUNTY OF ROANOKE

THE BANK OF FLOYD,	:	
	:	
Plaintiff.	:	
	:	
v.	:	JUDGMENT ORDER
	:	
GEORGE GILMORE MARTIN	:	CL 92-95
and	:	
JULIA S. MARTIN,	:	
	:	
Defendants.	:	

On Friday, October 15, 1993, came the plaintiff, The Bank of Floyd, by its president, R. Leon Moore, and by counsel, and came the defendants, George Gilmore Martin and Julia S. Martin, in person, neither of them being represented by counsel; and after preliminary motions ruled upon the Trial Court as reflected in the stenographic transcript of evidence, and duly objected and excepted to by the defendants, the issue was joined. Thereupon, came a jury summoned in the manner prescribed by law, from which the defendants challenged for cause, Charles Daniel Cox, III and he was replaced by Fred William Davis. Thereafter counsel for the plaintiff and the defendants in persons exercised their peremptory strikes, leaving the following as the jury for the trial of this action to wit: Shirley Millner, John Hatcher, Gary Dogan, Randall Hill, Charles Hofer, Donita Peverall and Martha Webb, who were sworn to truly try the issue joined, and thereupon the plaintiff, after opening statements, opened with its evidence and rested.

Whereupon, the defendants moved the Court to strike the plaintiff's evidence and for summary judgment in favor of the defendants, which was overruled by the Court and the defendants duly objected to for reasons set forth in oral argument and reflected in the stenographic transcript of evidence and other incidents of trial.

Thereafter, the defendants presented their evidence and rested. Whereupon, the plaintiff moved the Court to strike the defendants' evidence, and for entry of summary judgment in favor of the plaintiff. The motion for the plaintiff was sustained, by reason that only one witness, Leon Moore, the president of The Bank of Floyd, was the only witness called by both the plaintiff and defendants and his testimony being uncontradicted, there was no issue of fact for the jury to decide to which said ruling the defendants duly objected and excepted.

Thereupon, the jury was discharged by the Court and the defendants moved the Court for time for additional motions which permission the Court denied and to which the defendants duly objected and excepted.

It is therefore ADJUDGED and ORDERED that the plaintiff does have and recover of the defendants, as principal and interest through Friday, October 15, 1993, the sum of $170,183.27 and attorneys fees in the amount of $42,545.82.

And the Clerk of this Court shall forthwith certify a copy of this Order to all counsel of record.

All matters having been accomplished, this matter shall be stricken from the docket of this Court and place among the ended files.

ENTERED this 9th day of December, 1993.

/s/ _____

Judge

I request entry of this Order:

/s/ _____
Alton B. Prillaman, Esquire
Jolly, Place, Fralin & Prillaman, P.C.
3912 Electric Rd., S.W.
Roanoke, VA 24018
(703) 989-0000

We have seen this Order and object to its entry:

/s/ _____
George Gilmore Martin, pro se
6210 Aberdeen Drive
Atlanta, GA 30328
(404) 303-8618

/s/ _____
Julia S. Martin, pro se
6210 Aberdeen Drive
Atlanta, GA 30328
(404) 303-8618

Pursuant to Rule 1:13 and pursuant to the telephone conference with the Court on December 6, 1993 at 1:45 p.m., endorsement by the Defendants, George Gilmore Martin and Julia S. Martin, pro se, is hereby dispensed with. From the conference call, the Defendants' objections and exceptions to the entry of this Order with reference to 25% attorney's fees are duly noted by the Court as well as their objections and exceptions to this Final Order.

EXHIBIT "B"

CERTIFICATE

I, David B. Beach, Clerk of the Supreme Court of Virginia, do hereby certify that attached hereto is a true copy of the order entered on April 5, 1994 by this Court in the case of *George Gilmore Martin, et al* v. *The Bank of Floyd*, Record NO. 940278

Given under my hand and seal of said Court this 15th day of June, 1994.

/s/ _____
Clerk, Supreme Court of Virginia

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday *the 5th day of* April, 1994.

George Gilmore Martin, et al., *Appellants,*
against Record No. 940278
Circuit Court No. CL92000095
The Bank of Floyd, *Appellee.*
From the Circuit Court of Roanoke County

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of the opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,

Teste:

David B. Beach, Clerk
By: /s/
Deputy Clerk

Supreme Court, U.S.
FILED
APR 24 1995
OFFICE OF THE CLERK

No. 94-1514

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

GEORGE GILMORE MARTIN and
JULIA S. MARTIN,

Petitioners,

vs.

BANK OF FLOYD; Gentry, Locke,
Rakes & Moore; William R. Rakes;
William J. Creech; G. Harris Warner, Jr.
and Ronald Leon Moore,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioners' Reply to Respondents' Briefs in Opposition

George Gilmore Martin and
Julia S. Martin
5 Concourse Parkway
Suite 3100
Atlanta, Georgia 30328
Phone (404) 804-5815
Pro Se

BEST AVAILABLE COPY

As provided by Rule 14 of the Rules of the Supreme Court, "only the questions set forth in the petition . . . will be considered by the Court."

The questions set forth in the Petition are:

> (1) Is purposeful availment requirement for specific personal jurisdiction satisfied if defendants purposefully direct criminal activity into the forum and the plaintiffs' cause of action arises from that activity; and
>
> (2) Would the assertion of personal jurisdiction in this case comport with "fair play and substantial justice"?

The Brief in Opposition of Respondents Bank of Floyd and Ronald Leon Moore ask the Court to consider another question:

> Whether the Virginia Respondents subjected themselves to the jurisdiction of the Georgia District Court by mailing two form letters requesting an updated financial statement and a notice of foreclosure letter to the Petitioners in Georgia?

Pursuant to Rule 14, since this question is not set forth in the Petitioners' Petition, it can not be considered by the Court. Therefore, most of these Respondents' Brief is immaterial and irrelevant to the questions properly before the Court. In response to the parts of their Brief that may be relevant, the Petitioners respond as follows:

1. The letters, as set forth in the supplemental appendix hereto, show themselves to be more than letters "requesting updated financial information"; the letters of Leon Moore to petitioners dated 08-21-91, and 10-10-91, convey messages to the Petitioners that Bank wanted to "continue to serve your borrowing needs" and "we look forward to serving your banking needs in the future"; these messages are shown to have been false and deceptive by the Bank's

prior letter to Mr. Bill Rakes dated 08-13-91 wherein the Bank states "Leon Moore has spoken to you about the bank's desire to begin foreclosure proceeding on its $630,000 loan to George G. and Julia S. Martin. To begin the process, I am enclosing ....". Moore's two letters not only omitted to inform the Petitioners of the highly material fact that the Bank had already begun a foreclosure process concerning the Petitioners but also actively and falsely purported to the Petitioners that the Bank wanted to "continue serving [their] borrowing needs".

2. Twelve letters, including these two, were purposely caused to be sent <u>into</u> Georgia by these Respondents and others. The

letters have been alleged to have violated the U.S. Mail Fraud Laws in Georgia and to have constituted predicate acts of Racketeering activity in Georgia from which the Petitioners' cause of action arose.

3. The jurisdictional issue is not whether a large number of acts by Respondents occurred outside Georgia, but instead did a constitutionally sufficient minimum number of actions occur in Georgia to satisfy the Georgia Long-Arm Statute and the Federal Due Process clause.

Similarly, the Brief in Opposition of the other Respondents asks the Court to consider yet another question:

> Whether the district court, a Georgia forum, lacked personal jurisdiction over the defendant Virginia attorneys when their only contacts with Georgia

were (1) sending the petitioners, who had moved from Virginia to Georgia, a notice of foreclosure on collateralized Virginia property in connection with the petitioners' default on a loan obtained by petitioners, when they were Virginia residents, from a Virginia bank and (2) serving the petitioners with a summons in connection with the subsequent deficiency action brought by the attorneys on behalf of the Virginia bank?

Pursuant to Rule 14, since their question is not set forth in the Petitioners' Petition, it can not be considered by the Court. Therefore, as before, most all of these Respondents' Brief is immaterial and irrelevant to the questions properly before the Court.

In response to the few parts of the Brief that may be relevant, the Petitioners respond as follows:

1. The "special and important reasons" for granting the Writ of Certiorari are:

   (a) The Eleventh Circuit Court

of Appeals has decided a federal question in a way which conflicts with an applicable decision of the U.S. Supreme Court, i.e. Burger King v. Rudzewicz, 471 U.S. 462; and

(b) The U.S. Supreme Court has not explicitly considered the jurisdictional effects of defendants purposely directing criminal activity into a forum when a civil cause of action arises from that criminal activity. There are a large number of civil lawsuits based on criminal activity filed every year. Also, there is a growing tendency in the law to give civil redress to victims for injuries which

are sustained as a result of criminal activity of perpetrators. Therefore, the issue is important.

2. The Petitioners moved to Georgia about January 20, 1991; missed the payment due to the Bank on May 1, 1991; and the Bank started the foreclosure process on August 13, 1991; and Moore misinformed and deceived the Petitioners in Georgia on August 21, 1991, and October 10, 1991. Therefore, it is not accurate for these Respondents to state "the unilateral act of Petitioners moving to Georgia provided the sole reason for any contact by the attorneys with Georgia." The reasons alleged for which the attorneys had contact with Georgia was that they willingly chose to become

participants in schemes to cheat the Petitioners out of a substantial amount of money and used the U.S. Mail to further the schemes.

3. There is no mandatory counter-claim rule produced by Respondents showing that Petitioners were required to counter-sue the Respondents in Virginia. The Virginia judgment merely shows that the schemes are proceeding on course.

4. Contrary to assertions of these Respondents, the Georgia Long-Arm Statute, O.C.G.A. § 09-10-91, provides for

> "personal jurisdiction over any nonresident . . . . in the same manner as if he were a resident of the State, if in person or through an agent, he: . . . (2) Commits a tortious act or omission <u>within</u> the State".

> The Petitioners causes of action are for tortious acts and omissions within Georgia therefore, jurisdiction lies under O.C.G.A. § 09-10-91.

Since all Respondents have failed to address the questions properly before this Court as explicated in Petitioners' Petition, Petitioners respectfully suggest to the Supreme Court that Respondents have implicitly conceded that the alleged criminal activity directed at Petitioners in Georgia by Respondents satisfies the purposeful availment requirements for specific personal jurisdiction and that the assertion of personal jurisdiction in this case comports with "fair play and substantial justice."

George G. Martin,
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(404) 804-5815

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(404) 804-5815

SUPPLEMENTAL APPENDIX

Page

1. Letter from Moore to Respondents dated 08-21-91 11

2. Letter from Moore to Respondents dated 10-10-91 12

3. Letter from Bank to Bill Rakes dated 08-13-91 13

August 21, 1991

Mr. George G. Martin
6210 Aberdeen Drive, N.E.
Atlanta, Georgia 30328

Dear Mr. Martin:

Federal Regulations require a current financial statement and supporting financial statements on any customer borrowing from any FDIC Insured Bank.

During a recent examination by the regulators, the following information was found to be missing or out of date on your file:

1 - An up to date Financial Statement

In order that our Bank can remain in compliance and continue to serve your borrowing needs, we ask that the information be provided within 15 days.

Should you have any questions, please call me or Dianne Hamm. Thank you for your prompt attention to this matter. We look forward to serving your banking needs in the future.

Sincerely,

Leon Moore
Executive Vice President

LM/slr

Enclosure

October 10, 1991

Mr. George G. Martin
6210 Aberdeen Drive, N.E.
Atlanta, Georgia 30328

Dear Mr. Martin:

Federal Regulations require a current financial statement and supporting financial statements on any customer borrowing from any FDIC Insured Bank.

During a recent examination by the regulators, the following information was found to be missing or out of date on your file:

1 - An up to date Financial Statement

In order that our Bank can remain in compliance and continue to serve your borrowing needs, we ask that the information be provided within 15 days.

Should you have any questions, please call me or Dianne Hamm. Thank you for your prompt attention to this matter. We look forward to serving your banking needs in the future.

Sincerely,

Leon Moore
Executive Vice President
and CEO

LM/bws
Enclosure

August 13, 1991

Mr. Bill Rakes
Woods, Rogers and Hazelgrove
105 Franklin Road, S.W.
P.O. Box 720
Roanoke, Virginia 24004-0720

Dear Mr. Rakes:

Leon Moore has spoken to you about the bank's desire to begin foreclosure proceedings on its $630,000.00 loan to George G. and Julia S. Martin. To being the process, I am enclosing:

1. A loan statement as of August 12, 1991.

2. A copy of the Deed of Trust.

3. A copy of the Note.

4. A copy of a Certificate of Partial Satisfaction. (One lot has been released.)

5. A copy of the relevant title insurance policy.

6. A copy of the property appraisal, which also contains some plat descriptions.

You will notice that in addition to the one release, there is some difference between the appraisal and the deed of trust, i.e. Lot 15A.

Our collateral consists of lots in four parcels - Williamsburg Court, Nichols

Estates, Hidden Valley Forest and the "Colonial Williamsburg" Townhouse lots.

I understand from Mr. Moore that you will handle this case for us for a fee of the lesser of your actual charges or 5% of the sale proceeds.

If I can be of further assistance or if you need additional information to begin the proceedings, please contact me at the address above or telephone number above.

Sincerely,

Lawrence M. Renfroe
Senior Vice President

LMR/slr

Enclosures